No. 15-3569

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LISA ALLEN and MISTY DALTON
Plaintiffs-Appellants,

v.

GREATBANC TRUST COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois

Brief of the Amicus Curiae, Thomas E. Perez,
Secretary of Labor, United States Department of Labor,
in Support of Appellants Requesting Reversal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases-(continued):

Federal Cases-(continued):

Federal Statutes:

Federal Statutes-(continued):

Miscellaneous:

Miscellaneous-(continued):

STATEMENT OF THE ISSUES

This appeal stems from a suit brought by two participants in the Personal-Touch Employee Stock Ownership Plan (ESOP), a pension plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. Their complaint alleges that the plan trustee breached its duties and engaged in prohibited transactions under ERISA by allowing the ESOP to substantially overpay for stock in the sponsoring privately-held company. The district court dismissed the case on the pleadings. The Secretary's brief addresses the following issues on appeal:

1. Whether, under the pleading standards for cases concerning plan investments in publicly-traded stock set out by the Supreme Court in Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014), the participants were required to plead the existence of "special circumstances" that would have alerted their trustee, GreatBanc, to the fact that the price paid by the Personal-Touch Home Care, Inc. Employee Stock Ownership Plan for privately-held employer stock exceeded the stock's fair market value.

2. Whether, to survive a motion to dismiss on their prohibited-transaction claim under ERISA section 406(a), 29 U.S.C. § 1106(a), plaintiffs were required not only to allege a transaction proscribed by section 406(a), but also to allege facts

showing that the transaction was not exempt under the "adequate consideration" exemption in ERISA section 408(e), 29 U.S.C. § 1108(e).

THE SECRETARY'S INTEREST

The Secretary of Labor has primary regulatory and enforcement authority for Title I of ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc). The Secretary has a substantial interest in ensuring that the "special circumstances" pleading standard recently set out by the Supreme Court in Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014), which is based on the assumption that publicly-traded stock generally is correctly priced so long as there is no fraud on the market, is not misapplied in the very different context of determining whether a fiduciary overpaid for privately-held stock. The Secretary also has a substantial interest in ensuring that plan fiduciaries do not cause plans to engage in transactions prohibited by ERISA section 406, and that participants and beneficiaries are not required to plead facts relevant to a fiduciary's affirmative defense to such a prohibited transaction, especially given that, in many cases, such facts may reasonably be ascertained only through discovery.

STATEMENT OF THE CASE

1. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. Shaw v. Delta Air

Lines, Inc., 463 U.S. 85, 90 (1983). It does this primarily by imposing, in section 404, a number of stringent duties on plan fiduciaries, including a duty of loyalty, a duty to act for the exclusive purpose of providing plan benefits and defraying reasonable expenses, and a duty of prudence. 29 U.S.C. § 1104(a)(1)(A), (B). In addition, the statute, in section 406, supplements these general fiduciary duties by flatly prohibiting fiduciaries from engaging in certain transactions that are likely to harm the plans they serve. 29 U.S.C. § 1106. As relevant here, ERISA prohibits any sale of property between a plan and a related party, known under ERISA as "party in interest," id. at § 1106(a)(1)(A), although it exempts the sale of employer stock in some situations, including where it is for "adequate consideration," id. § 1108(e).[1]

2. Plaintiffs Lisa Allen and Misty Dalton are employees of Personal-Touch Home Care, Inc. ("Personal-Touch") and participants in their company's ESOP. A11-A12, ¶¶ 2, 4. Personal-Touch is a privately-held company that provides home health care and related services. A12, ¶ 5. On January 1, 2010, Personal-Touch adopted the ESOP, and some time later that year appointed GreatBanc to represent the ESOP as its trustee in a stock purchase transaction.

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[1] ERISA defines "adequate consideration" for stock and other assets for which there is not a "generally recognized market," such as the Personal-Touch stock at issue here, as "the fair market value of the asset as determined in good faith by the trustee." 29 U.S.C. § 1002(18).

A14-A15, ¶¶ 17-18. On December 9, 2010, GreatBanc caused the ESOP to purchase Personal-Touch stock from the company and its principal shareholders for $60 million (the "Transaction"). A15, ¶ 19. To finance the ESOP's purchase, GreatBanc authorized the ESOP to take out a $60 million loan from Personal-Touch at an interest rate of 6.25%. A12, ¶ 7; A15, ¶ 20.

By December 31, 2010, just three weeks after the Transaction closed, the value of the ESOP's Personal-Touch stock had already declined by 22%, to approximately $47 million. A 15, ¶ 21. By the end of 2011, the stock's value had further declined to approximately $30 million, a nearly 50% reduction from the Transaction price. A16, ¶ 22. As of the end of 2013, the stock's value had declined even more, to less than $27 million. Id., ¶ 23.

3. On April 7, 2015, plaintiffs filed a complaint in the United States District Court for the Northern District of Illinois asserting two claims for relief against GreatBanc for alleged ERISA violations. Because the ESOP was purchasing employer stock that was not publicly traded, the ESOP purchase required, as a first step, that the stock be valued. The first claim alleges that GreatBanc acted imprudently under ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), by, among other things, failing to determine that it received complete and accurate financial information from Personal-Touch relevant to the valuation, failing adequately to investigate the reasonableness of the financial projections

provided by Personal-Touch, relying upon a flawed valuation report, and ultimately causing the ESOP to pay more than fair market value for Personal-Touch stock. A16, ¶ 24; A17, ¶ 27; A19-A20, ¶ 38. As additional factual support for their imprudence claim, the complaint details, among other things, the decline in the stock's value in the months and years following the Transaction, and explains that "[g]iven the precipitous decline in the value of Personal-Touch stock, it is implausible that GreatBanc adequately and diligently reviewed or analyzed Personal-Touch's earning statements." A17, ¶ 30.

The second claim alleges that GreatBanc violated ERISA's prohibited transactions provision, section 406, 29 U.S.C. § 1106, in three ways: (1) by causing the ESOP to purchase stock from "parties in interest" (the selling shareholders), in violation of ERISA section 406(a)(1), A21, ¶ 42; (2) by acting in the Transaction on behalf of parties who were adverse to the ESOP (the selling shareholders), as evidenced by the substantial overpayment it caused the sellers to receive, in violation of ERISA section 406(b)(2), A21-22, ¶ 46; and (3) by receiving compensation from the selling shareholders, in violation of ERISA section 406(b)(3), A22,¶ 47.

4. On October 1, 2015, the district court dismissed the case in its entirety. A1-A8. The court held that neither of plaintiffs' claims satisfied the pleading standards of Federal Rule of Civil Procedure 8(a), as articulated by the

Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Turning first to plaintiffs' breach of fiduciary duty claim, the court focused its analysis "solely on Defendant's actions or inactions at the time of the ESOP formation and stock purchase." A4. According to the court, the complaint's allegations concerning GreatBanc's transgressions contemporaneous with the Transaction – including GreatBanc's failure to thoroughly investigate the value of Personal-Touch stock – were "conclusory" and, as a result, "need not be accepted as true." Id.

As to the complaint's more specific allegations of the stock's post-Transaction decline, the court reasoned that a post-purchase stock-price drop "is not necessarily indicative of the fair market value before the purchase" and "does not speak directly to Defendant's duty 'under the circumstances then prevailing' at the time of the purchase." Id. In further support of this conclusion, the court drew upon the Supreme Court's decision in Fifth Third Bancorp v. Dudenhoeffer, which held that a plaintiff must show "special circumstances" to properly plead a claim that a fiduciary should have known, based on publicly-available information alone, that a publicly-traded stock was overpriced at the time of purchase. 134 S. Ct. 2459, 2471 (2014). While recognizing that the instant case involves stock that is not publicly traded, the district court nevertheless reasoned that Dudenhoeffer's "special circumstances" requirement "seems applicable in this case." A5. The court then concluded that, by failing to plead any special circumstances – such as a specific risk facing Personal-Touch that Greatbanc failed to properly assess – plaintiffs did not meet the pleading standards of Rule 8 or Dudenhoeffer. Id.

The court dismissed plaintiffs' prohibited transaction claim for the same reasons. The court recognized that section 406 "categorically prohibits almost any transaction between an ESOP and a party in interest," but then noted that under ERISA section 408(e), "[a] purchase of shares by an ESOP from a party in interest is exempted from being a prohibited transaction if the shares are purchased for 'adequate consideration.'" A6-A7 (quoting 29 U.S.C. § 1108(e)(1)(A)). While acknowledging that,"[a]t trial, the defendant would carry the burden of satisfying this [adequate-consideration] test," the court nevertheless held that this test supplied the "central question" on plaintiffs' prohibited transaction claim, which was the same question on which their fiduciary-breach claim turned: "did Plaintiffs successfully plead that the ESOP paid more than fair market value for the Personal-Touch shares?" A7. Because plaintiffs' fiduciary duty claim failed, the court reasoned, their prohibited transaction claim must fail along with it. Id. At plaintiffs' request, the court subsequently entered a final judgment. A9-A10.

SUMMARY OF ARGUMENT

The district court erroneously conflated the pleading standards for two distinct claims asserted in this case, and dismissed both for failing to satisfy a nebulous "special circumstances" test grafted from a Supreme Court decision (Dudenhoeffer) that was never meant to apply to a case like this one.

1. The Supreme Court in Dudenhoeffer required plaintiffs to plead the existence of "special circumstances" in a very specific class of cases: those involving allegations that a fiduciary should have known from "publicly available information alone" that a "publicly traded stock" was overvalued. Dudenhoeffer, 134 S. Ct. at 2471. And it imposed this requirement for a very specific reason: because fiduciaries may, as a general matter, assume that the market price of publicly-traded stock is an "unbiased assessment of the security's value," meaning that only in "special circumstances" would it be plausible to expect a fiduciary to realize that the presumptively efficient market, in fact, was wrong. Id. at 2472. In contrast, plaintiffs here allege that GreatBanc imprudently purchased stock in a privately-held company that does not trade on any stock market, and whose value can be ascertained only through the good-faith and painstaking due diligence of its purchaser. Plaintiffs do not need to plead additional "special circumstances" under Dudenhoeffer in order to state a claim that GreatBanc failed in this regard and thus

breached its duty of procedural prudence under ERISA section 404, or that it engaged in a prohibited transaction under ERISA section 406.

2. Even if plaintiffs were required to plead "special circumstances" to sustain their fiduciary breach claim, they certainly were not required to do so for their prohibited-transaction claim. Section 406 of ERISA imposes per se prohibitions on certain transactions that Congress considered especially rife with the potential for abuse, like those between a plan and company insiders, who ERISA refers to as "parties in interest." See 29 U.S.C. § 1106. Despite finding that the Transaction here was one between a plan and "parties in interest," the district court nevertheless faulted plaintiffs for failing to plead facts negating an exemption to the prohibited transaction rules set out in ERISA section 408, 29 U.S.C. § 1108. This Court has made clear, however, that the section 408 exemptions are affirmative defenses on which the defendant has the burden of proof. And this Court has been equally clear that plaintiffs need not allege facts negating a defendant's affirmative defense, whether grounded in ERISA or any other statute. Plaintiffs were required only to plead a transaction proscribed by ERISA section 406, which they indisputably did.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING DUDENHOEFFER'S "SPECIAL-CIRCUMSTANCES" REQUIREMENT TO CLAIMS INVOLVING THE PURCHASE OF NON-PUBLICLY-TRADED STOCK

The district court erred in applying the Supreme Court's decision in Dudenhoeffer in analyzing the sufficiency of the plaintiffs' fiduciary-breach and prohibited-transaction claims. Invoking Dudenhoeffer, the court faulted plaintiffs for failing to plead "special circumstances" that should have alerted GreatBanc to the fact that it was paying too much for Personal-Touch stock. A5. As explained below, the letter and logic of Dudenhoeffer's "special-circumstances" requirement is confined to cases involving a fiduciary's purchase of publicly-traded stock, not the non-publicly traded stock at issue here.

Prior to Dudenhoeffer, a number of lower courts had applied a "presumption of prudence" to an ESOP fiduciary's decision to invest in employer stock. See, e.g., Moench v. Robertson, 62 F.3d 553, 570 (3d Cir. 1995); Kuper v. Iovenko, 66 F.3d 1447 (6th Cir.1995); Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir. 2008); Quan v. Computer Scis. Corp., 623 F.3d 870, 881 (9th Cir. 2010); In re Citigroup ERISA Litig., 662 F.3d 128, 139–140 (2d Cir. 2011) (all abrogated by Dudenhoeffer, 134 S. Ct. 2459). This presumption sought to reconcile two seemingly competing forces facing ESOP fiduciaries: ERISA's stringent duty of prudence on the one hand, and ERISA's requirement that ESOPs invest "primarily" in employer stock on the other. See 29 U.S.C. § 1107(d)(6)(A) (defining an ESOP as a stock bonus plan "which is designed to invest primarily in qualifying employer securities."). With ERISA encouraging ESOP fiduciaries to purchase employer stock, the theory went, these fiduciaries should be given some leeway for acting accordingly, which courts attempted to accomplish through a rebuttable presumption of prudence.

In Dudenhoeffer, the Supreme Court held that ESOP fiduciaries are not entitled to a special presumption of prudence when they purchase employer stock; as the Court reasoned, Congress already accommodated ESOP fiduciaries by specifically exempting them from ERISA's diversification requirement, 29 U.S.C. § 1104(a)(1)(C). Dudenhoeffer, 134 S. Ct. at 2467. Rather, ESOP fiduciaries "are subject to the duty of prudence just as other ERISA fiduciaries are." Id. Although the Court's rejection of the presumption of prudence is Dudenhoeffer's core holding, the Court went on to address concerns that the presumption's demise would lead inevitably to meritless lawsuits against ESOP fiduciaries. One safeguard, the Court explained, is the pleading standard required to survive a motion to dismiss under Rule 12(b)(6), which the Court most recently expounded on in Twombly and Iqbal. 134 S. Ct. at 2471. As those cases instruct, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Iqbal, 556 U.S. at 679 (emphasis added). Whether a claim is "plausible," the Court said in Iqbal, will be "context-specific," but in all cases the well-pleaded facts must "permit the court to infer more than the mere possibility of misconduct." Id.

The Court in Dudenhoeffer then offered guidance for how Iqbal's plausibility standard would apply to the case before it, where the plaintiffs alleged that defendants "knew or should have known in light of publicly available information . . . that continuing to hold and purchase Fifth Third stock was imprudent." Dudenhoeffer, 134 S. Ct. at 2471. The Court explained that fiduciaries are not expected when purchasing or selling publicly-traded employer stock to outsmart the stock market and "may, as a general matter, prudently rely on the market price." Id. In support of that proposition, the Supreme Court cited Summers v. State St. Bank & Tr. Co., where this Court similarly said that "[a] trustee is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him." 453 F.3d 404, 408 (7th Cir. 2006) (citing Burton G. Malkiel, "Reflections on the Efficient Market Hypothesis: 30 Years Later," 40 Financial Rev. 1 (2005)). Indeed, this Court reasoned that, for a trustee to think that it could predict the future of a publicly-traded company more accurately than the market, "would be hubris." Id. Given the general reliability of publicly-traded stock prices, the Supreme Court concluded in Dudenhoeffer that "where a stock is publicly traded" – like that of Fifth Third Bank – "allegations that a fiduciary should have recognized from publicly-available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." Id. (emphasis added).[2]

By its plain terms, then, Dudenhoeffer's "special-circumstances" pleading requirement is confined to cases "where a stock is publicly traded." Id. In contrast, plaintiffs here alleged that GreatBanc overpaid for stock in a private company (Personal-Touch) that does not trade on a public stock exchange. Moreover, Dudenhoeffer was about fiduciary breaches under section 404 and nothing in the Supreme Court's decision indicates that it was speaking to prohibited transaction allegations under section 406, such as those alleged here and discussed further in Part II.

Nor does the logic for such a heightened pleading burden apply to a case involving a fiduciary's purchase of non-publicly-traded stock. The Supreme Court predicated its "special circumstances" requirement on the notion that, in general, public stock market prices represent "'an unbiased assessment of the security's value.'" Dudenhoeffer, 134 S. Ct. at 2472 (quoting Halliburton Co. v. Erica P. John Fund, Inc. 134 S. Ct. 2398, 2411 (2014)). Hence, allegations that a fiduciary

[2] The Court did not elaborate on what would qualify as "special circumstances," other than to say that they would have to "affect[] the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information.'" 134 S. Ct. at 2472 (quoting Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411 (2014)).

should have understood from public information that the "unbiased" market price of a publicly-traded stock did not reflect its true value are implausible, absent "special circumstances." Dudenhoeffer, 134 S. Ct. at 2471. But for private-company stock, there is no stock market price that serves as a reliable proxy for the stock's value. Instead, a fiduciary must determine how much to pay through its own "good faith" investigation, a process that involves performing due diligence on the company and assigning it an enterprise value. See Keach v. U.S. Trust Co., 419 F.3d 626, 636 (7th Cir. 2005). Even where fiduciaries enlist the help of expert valuation advisors, their advice will not "operate as a complete whitewash which, without more, satisfies ERISA's prudence requirement." Donovan v. Bierwirth, 680 F.2d 263, 272 (2d Cir. 1982). Rather, the fiduciary still must "'investigate the expert's qualifications,'" "'provide the expert with complete and accurate information,'" and "'make certain that reliance on the expert's advice is reasonably justified under the circumstances.'" Keach, 419 F.3d at 637 (quoting Howard v. Shay, 100 F.3d 1484, 1489 (9th Cir.1996)).

Thus, unlike a stock market price, there is nothing inherently reliable about a fiduciary's investigation of a private company's value, and nothing in Dudenhoeffer suggests that fiduciaries are entitled to a thumb on the scale in a case such as this, where Plaintiffs allege that Greatbanc determined the value of the privately-held

Personal-Touch stock based on "inflated financial projections and a flawed valuation report." A16, ¶ 24.

If anyone should receive the benefit of the doubt as to the adequacy of a fiduciary's investigation of a private company's fair market value, ERISA makes clear that it is the participants and beneficiaries, particularly with regard to the claim that the trustee violated ERISA's prohibited transaction rules. As discussed in Section II, infra, it is the fiduciary's burden to prove that an ESOP's otherwise prohibited purchase of employer stock from company insiders (as happened here) is exempted under ERISA section 408(e), which entails proving that the fiduciary determined the stock's fair market value by way of a "good faith" investigation. See 29 U.S.C. § 1002(18)(B); Keach, 419 F.3d at 636. But by requiring plaintiffs to plead "special circumstances" relating to "the financial situation of Personal-Touch" to sustain their claim that GreatBanc caused the ESOP to engage in a prohibited transaction, A5 – rather than just the prohibited transaction itself – the district court effectively transferred the burden of proving the stock's fair market value from the fiduciary (GreatBanc) to the participants (plaintiffs).

Thus, neither Dudenhoeffer nor ERISA required plaintiffs to plead "special circumstances" that should have alerted GreatBanc to the fact that it was paying too much for Personal-Touch stock.

II. THE DISTRICT COURT ERRED IN REQUIRING PLAINTIFFS TO PLEAD FACTS NEGATING AN EXEMPTION ON WHICH DEFENDANT HAS THE BURDEN OF PROOF IN ORDER TO SURVIVE A MOTION TO DISMISS ON THEIR PROHIBITED TRANSACTION CLAIM

In dismissing plaintiffs' prohibited-transaction claim under ERISA section 406(a), the district court acknowledged that the transaction at issue, as pled, was prohibited by section 406(a). But according to the court, that was not enough, as plaintiffs also had to plead that the transaction was not exempt under ERISA section 408(e)'s "adequate-consideration" exemption. And because the adequate-consideration analysis, the court said, shared the same central question with plaintiffs' deficient fiduciary breach claim, the court dismissed plaintiffs' section 406(a) claim for the same reasons it dismissed their section 404(a) claim. A7. In so holding, the district court impermissibly imposed on plaintiffs the burden to plead facts disproving that the fiduciaries had met section 408(e)'s adequate consideration exemption, which is an affirmative defense on which the defendant has the burden of proof.

In section 406 of ERISA, Congress strengthened and supplemented ERISA's exacting fiduciary standards "by categorically barring certain transactions deemed 'likely to injure the pension plan.'" Harris Trust & Sav. Bk. v. Salomon Smith Barney, Inc., 530 U.S. 238, 241-42 (2000) (citation omitted). Among these proscriptions is a transaction between a plan and a "party in interest," 29 U.S.C. §

1106(a), a status that is defined to include company insiders, such as "any fiduciary," and "any officer, director, or 10% or more shareholder of an employer whose employees are covered by the plan." 29 U.S.C. § 1002(14)(A) and (H).

"Doubtlessly recognizing that such absolute prohibitions would significantly hamper the implementation of ESOPs, particularly by small companies, Congress enacted in Section 408 a conditional exemption from the prohibited transaction rules for acquisition of employer securities by ESOPs and certain other plans." Donovan v. Cunningham, 716 F.2d 1455, 1465 (5th Cir. 1983). Specifically, section 408(e) of ERISA allows a plan to buy employer stock from a party in interest if the plan pays no more than "adequate consideration." 29 U.S.C. § 1108(e). ERISA, in turn, defines "adequate consideration" for assets other than publicly-traded stock as the "fair market value of the asset as determined in good faith by the trustee or named fiduciary." 29 U.S.C. § 1002(18). In light of the definition's "good faith" component, this Court has said "that the adequate consideration test focuses on the conduct of the fiduciaries in determining the price, not the price itself." Eyler v. C.I.R., 88 F.3d 445, 455 (7th Cir. 1996). Because section 404(a)'s prudence standard likewise focuses on a fiduciary's conduct, the question whether an ESOP fiduciary satisfied its section 404(a) fiduciary duties overlaps substantially with the question of whether it qualifies for section 408(e)'s adequate-consideration exemption. See Cunningham, 716 F.2d at

1467-68 (satisfying the adequate-consideration exemption requires "a determination of fair market value by way of a prudent investigation in the circumstances then prevailing.") (emphasis added).

But there is one significant difference. Whereas plaintiffs have the burden of proving a fiduciary breach under section 404(a), this Court has correctly held that, for purposes of section 408(e), the "trustee or fiduciary has the burden to establish that the ESOP paid no more than fair market value for the asset, and that the fair market value was determined in good faith by the fiduciary." Keach v. U.S. Trust Co., 419 F.3d 626, 636 (7th Cir. 2005); accord Fish v. GreatBanc Trust Co., 749 F.3d 671, 685 (7th Cir. 2014).[3] Because the burden of proof is on the fiduciary to show that section 408 exempts an otherwise prohibited transaction, the only obligation imposed on a plaintiff asserting a prohibited transaction claim is to plead and prove the existence of a transaction prohibited by section 406(a).

[3] This Court is hardly alone in imposing on defendants the burden of proving section 408's prohibited-transaction exemptions. See, e.g., Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1215 (2d Cir. 1987) ("a fiduciary charged with a violation of Section [1106(b)(3)] . . . must prove by a preponderance of the evidence that the transaction in question fell within an exemption"); Elmore v. Cone Mills Corp., 23 F.3d 855, 864 (4th Cir. 1994) ("in order to avoid liability under [Section 1106, the defendant] bears the burden of proving the transaction was for adequate consideration in compliance with [Section 1108(e)]"); Donovan v. Cunningham, 716 F.2d 1455, 1467-1468 (5th Cir. 1983) (similar); Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996), cert. denied, 520 U.S. 1237 (1997) (characterizing defendant's burden of proving adequate-consideration exemption as a "heavy one").

That is exactly what the Eighth Circuit concluded in Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 602 (8th Cir. 2009). In that case, the district court dismissed plaintiffs' section 406(a)(1) claim because the complaint "failed to show that [the transactions] were not exempted by § 1108." Id. at 560. "This was wrong," the Eighth Circuit held, "because the statutory exemptions established by § 1108 are defenses which must be proven by the defendant." Id. at 601. The court instead found that the plaintiff had properly stated a claim simply by alleging that the defendant caused the plan to enter a transaction proscribed by section 406(a)(1)(C). Id. This was "sufficient to shift the burden to appellees to show that 'no more than reasonable compensation [was] paid' for Merrill Lynch's services," which was the exemption defendant was claiming in that case. Id. (quoting 29 U.S.C. § 1108(b)(2)).

While this Court has not specifically considered whether plaintiffs asserting prohibited-transaction claims under ERISA section 406 must plead facts negating the corresponding section 408 exemption (notwithstanding that defendants have the burden of proof on that score), it has held that, in general, "a plaintiff is not required to negate an affirmative defense in his complaint." Tregenza v. Great Am. Commc'ns Co., 12 F.3d 717 (7th Cir. 1993); Mosely v. Bd. of Educ. of the City of Chicago, 434 F.3d 527, 533 (7th Cir. 2006) (same). Rather, it is a defendant's obligation to plead the applicability of an affirmative defense, and to do so consistent with the requirements of Rule 8(a). Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989) ("Affirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure."). To be sure, if a plaintiff's complaint, on its face, happens to establish an affirmative defense, then the complaint may be dismissed on that basis. Jones v. Bock, 549 U.S. 199, 214-15 (2007) ("Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground.") (emphasis added). "But it does not follow from the fact that a plaintiff can get into trouble by pleading more than he is required to plead that he is required to plead that more." Tregenza, 12 F.3d at 718.

Here, while correctly acknowledging that, "[a]t trial, the defendant would carry the burden of satisfying [the adequate consideration] test," the district court incorrectly placed the burden to plead it on plaintiffs. A7. Indeed, the court incorrectly concluded that "the central question" on plaintiffs' section 406(a) claim is "the same" question on which the viability of plaintiffs' section 404(a) claim turned: "did Plaintiffs successfully plead that the ESOP paid more than fair market value for the Personal–Touch shares?" Id. But it is not. Instead, on plaintiffs' section 406(a) claim, the question whether the plan paid fair market value is one that must be answered by Greatbanc, the trustee who engaged in the prohibited transaction. All that plaintiffs were required to plead was that GreatBanc caused the ESOP to purchase Personal-Touch stock from a "party in interest" and thereby violated section 406(a). As the district court correctly concluded, they did. See A6 ("Personal–Touch is a party in interest because it is an employer whose employees are covered by the ESOP."). Absent a finding that the complaint established on its face that the ESOP paid adequate consideration for the stock (a finding the district court did not and could not make), Jones, 549 U.S. at 214-15, that should have been enough for plaintiffs to survive GreatBanc's motion to dismiss on their section 406 claim.

To be sure, GreatBanc will protest that if a plaintiff need only plead the bare existence of a prohibited transaction to survive a motion to dismiss, Rule 8 will be too easily met in cases involving ESOP transactions, which almost always are prohibited by section 406(a). But as the Eighth Circuit explained in Braden, such concerns ignore the severity of the conduct proscribed by section 406(a) – in short, insider transactions and self-dealing – and the fact that "in such situations the burden of proof is always on the party to the self-dealing transaction to justify its fairness." Braden, 588 F.3d at 602. They also ignore "the fact that ERISA is a remedial statute to be liberally construed in favor of employee benefit fund participants." Kross v. W. Elec. Co., 701 F.2d 1238, 1242 (7th Cir. 1983). As the Supreme Court has explained in construing an exemption to the similarly remedial

Securities Act of 1933, "[k]eeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable." Sec. & Exch. Comm'n v. Ralston Purina Co., 346 U.S. 119, 126 (1953).

Further, requiring plaintiffs to negate in their complaints the applicable section 408 exemption would often unfairly impose on plaintiffs the burden of pleading facts "that remain in the sole control of the parties who stand accused of wrongdoing" – in this case, facts concerning GreatBanc's internal procedures to determine Personal-Touch's fair market value. Braden, 588 F.3d at 602; Fish, 749 F.3d at 686 ("The burden of proof makes good sense as a policy matter because the fiduciary will ordinarily have the information needed to know whether an exception applies under § 1108."). And this concern would not be limited to section 408(e)'s adequate-consideration exemption if this Court were to hold that plaintiffs must plead facts that plausibly show that the defendants who have engaged in a prohibited transaction do not meet an exemption under section 408 of ERISA. For example, section 408(b)(19) exempts "cross trading" transactions, which involve "the purchase and sale of a security between a plan and any other account managed by the same investment manager," but only if each of seven separate conditions are satisfied, many of which involve facts that an ordinary participant could not reasonably be expected to ascertain. 29 U.S.C. §

1108(b)(19). Indeed, only the fiduciary would know whether it "authorize[d] in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H)." 29 U.S.C. § 1108(b)(19)(D).

In any event, there are already a number of safeguards in place that lessen the likelihood of plaintiffs filing suit over transactions that plainly are exempted by section 408. First, Rule 11 of the Federal Rules of Civil Procedure requires attorneys to certify, subject to court sanction, that their complaints are "not being presented for any improper purpose" and "are warranted by existing law." Fed. R. Civ. P. 11(b). This Court has said that "[i]n deciding whether sanctions should be imposed on plaintiffs who filed unfounded cases . . . plaintiffs and their attorneys 'may have a responsibility to examine whether any obvious affirmative defenses bar the case.'" Fish, 749 F.3d at 687 (quoting Matter of Excello Press, Inc., 967 F.2d 1109, 1113 (7th Cir.1992)). In the same vein, the Supreme Court has suggested that a complaint does not state a "plausible" claim for relief where there is "an obvious alternative explanation" for the alleged conduct that renders it permissible. Twombly, 550 U.S. at 567. District courts also have tools at their disposal prior to allowing discovery in meritless cases, including "order[ing] a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant[ing] the defendant's motion for a more definite statement under Rule 12(e)." Crawford-El v. Britton, 523 U.S. 574, 598 (1998). And, of course, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." Id. at 600. But none of these safeguards justifies the district court's dismissal of plaintiffs' section 406(a) claim in this case.

CONCLUSION

For these reasons, the Secretary requests that the district court's decision be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,539 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

I further certify that this amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a monospaced typeface using Microsoft Word version 2010 in 14-point Times New Roman font.

Dated: February 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2016, true and correct copies of the foregoing Brief of the Amicus Curiae Thomas E. Perez, Secretary of the United States Department of Labor, in Support of Appellants Requesting Reversal, were served upon the following counsel of record and this Court by ECF.

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